COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING
{Chapter VIII, Rule 32(2)(b)}
Description of the Case.

Criminal Appeal No. 2035 of 2001
(Old Case No. 506 of 1988)

1. Babu Ram son of Sri Balswarup Tyagi, resident of village Jualgarh Patti Maletha, P.S. Kirti Nagar, District Tehrigarhwal

2. Harshu alias Harshmani, son of Sri Dharmanand Puri, resident of village Jualgarh Patti Maletha, P.S. Kirti Nagar, District Tehrigarhwal

.....Appellants

Versus

State of U.P. .....Opposite Party

Ms. Pushpa Joshi, learned counsel for appellant no. 1,
Sri R.S. Bisht, learned Amicus Curiae for appellant no. 2
Sri Harish Pujari, learned AGA for the State.

Approved for reporting
~~Not approved for reporting~~

Dated: September 22, 2007

(Dharam Veer, J.)

COURT NO.7

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 2035 of 2001
(Old Case No. 506 of 1988)

1. Babu Ram son Sri Balswarup Tyagi
resident of village Jualgarh Patti Maletha
P.S. Kirti Nagar,
District Tehrigarhwal

2. Harshu alias Harshmani
son of Sri Dharmanand Puri
resident of village Jualgarh Patti Maletha
P.S. Kirti Nagar,
District Tehrigarhwal

.....Appellants

Versus

State of U.P. ....Opposite Party

Mr. Pushpa Joshi, learned counsel for appellant no.1,
Sri R.S. Bisht, learned Amicus Curiae for appellant no.2
Sri Harish Pujari, learned AGA for the State.

Dated: 22.09.2007

Hon'ble Dharam Veer, J.

This criminal appeal has been preferred under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) against the judgment and order dated 21.01.1988 passed by Sessions Judge, Tehri Garhwal in Sessions Trial No. 10 of 1987, State v. Babu Ram and another, whereby the learned Sessions Judge has convicted appellant Babu Ram under Section 366 of the Indian Penal Code, 1860 (hereinafter referred to as IPC) and awarded a sentence of four years' R.I. and the appellant Harshu has been convicted for offences under Section 376 & 366 IPC and awarded sentence of eight years' R.I. under Section 376 IPC and four years'

R.I. under Section 366 IPC and it has been directed that both the sentences will run concurrently.

2. In Brief, the prosecution case is that Smt. Sundari Devi, mother of victim Shakuntala, lodged an FIR at Police Station Kirti Nagar, Sub District-Dev Prayag, District Tehri Garhwal on 27.09.1986 at 3.30 PM with the allegation that the applicant belongs to village Jualgarh and appellant Babu Ram belongs to District Bijnor and he used to live in her village and appellant Harshu used to visit her village occasionally. Her daughter Shakuntala, who is about 18 years of age was taken away by Harshu with the help of Babu Ram. She came to know that her daughter is in some village of District Bijnor in the house of the relatives of Babu Ram. The FIR is Ex.Ka-2 and on the basis of this FIR, a chick report was prepared by Head Moharir Sher Singh Bora i.e. Ex.Ka-3. The entry in the G.D. was made, the carbon copy of the G.D. is Ex.Ka-4. A letter i.e. Ex.Ka-1 was written by the victim Shakuntala to her mother, that letter was taken into possession by the police and prepared a Fard i.e. Ex.Ka-5. Later on, victim Shakuntala was recovered from the house of Rishipal, village Mahmudpur, Police Station Nahtor, District Bijnor on 01.10.1986 and the recovery memo was prepared, that recovery memo is Ex.Ka-6. The investigation in the above said case was entrusted to S.I. Hari Singh Tomar, who during the course of investigation prepared a site plant of the place of occurrence showing the recovery of victim Shakuntala, i.e. Ex.Ka-7. The entry about the above said recovery of Shakuntala was also made in the G.D., the copy of G.D. is Ex.Ka-8. Victim Shakuntala was medially examined by the Doctor on duty of Women

Hospital, Bijnor on 02.10.1986, the copy of the medical report is Ex.Ka-10. Supplementary medical report was prepared by the medical Officer, Women Hospital, Bijnor dated 08.10.1986 is Ex.Ka-11. The medical report prepared by the Chief Medical Officer is Ex.Ka-12. During the course of the investigation the investigating Officer has recorded the statements of the witnesses and after completing the investigation he has submitted the charge sheet on 15.11.1986, the charge sheet is Ex.Ka-9 The charge sheet was submitted by the Investigating Officer against appellant Harshu under Section 366 & 376 IPC and against appellant Babu Ram under Section 366 IPC.

3. Learned Chief Judicial Magistrate after complying the provisions of Section 207 Cr.P.C. committed the case to the Court of Session under Section 209 Cr.P.C.

4. Learned Sessions Judge framed charges against appellant Harshu under Section 366 & 376 IPC on 28.08.1987 and the charges were read over and explained to the appellant who pleaded not guilty and claimed to be tried. Charges against appellant Babu Ram were framed under Section 366 IPC on 28.08.1987 and the charges were read over and explained to the appellant who also pleaded not guilty and claimed to be tried.

5. To prove its case the prosecution examined P.W.1 Shakuntala (victim), P.W.2 Smt. Sundari Devi (complainant and mother of the victim), P.W.3 Rishipal, Husband of the victim Shakuntala, P.W.4 Mukandi Lal,

Who is maternal uncle of the victim, P.W.5 S.I. Hari Singh Tomar (Investigating Officer of the case), P.W.6 Karan Singh (Investigating Officer) and P.W.7 Dr. Z.N. Khan After that the statements of the appellants had been recorded under Section 313 Cr.P.C., who denied the allegations made against them. Babu Ram stated that he has falsely been implicated due to the enmity of the village election. Appellant Harshu has also denied the allegation made against him and he has stated in the answer question no. 12 that Shakuntala is his married wife.

6. After appreciating the evidence on record and hearing learned counsel for both the parties, the learned Sessions Judge has convicted the appellant Babu Ram under Section 366 IPC and awarded sentence of four years' R.I. and the appellant Harshu has been convicted for offences under Sections 376 & 366 IPC and awarded sentence of eight years' R.I. under Section 376 IPC and four years' R.I. under Section 366 IPC and it has been directed that both the sentences will run concurrently.

7. Against the said judgment and order, the appellants have preferred the present appeal before this Court.

8. I have heard Ms. Pushpa Joshi, learned counsel for appellant no. 1-Babu Ram and Sri R.S. Bisht, learned Amicus Curiae for appellant no. 2- Harshu as well as Sri Harish Pujari, learned Addl. G.A. for the State and perused the entire record of the trial court and the instant appeal.

9. To prove its case the prosecution has examined P.W.1 Shakuntala, whose statement has been recorded on 16.09.1987 and on the date of statement she has stated her age 20-21 years. She has stated in her statement that appellants Babu Ram and Harshu were known to her. They used to live in her village. She used to go in the forest for grazing goats and appellant Harshu also used to go in the forest for grazing the goats and Harshu used to talk with her in a sweet language and he also used to give her bread and biscuits. She has further stated that about two years back Harshu committed a rape with her and she had cried but nobody was there. She has further stated that Harshu kept on in doing sexual intercourse with her continuously 3 to 4 months due to which she had become pregnant. After some days, she went to Pauri with Harshu for abortion but the nurses told her that as the child in her womb is about five months old so the abortion is not possible. After that she came to her house along with Harshu. Thereafter, Harshu called her in Srinagar and her mother permitted her to go to Srinagar and in Srinagar Harshu took her to Pundir Hotel. In Srinagar Police Station the brother of her sister-in-law (Bhabhi) informed the police that is why she was taken to the Police Station. In the next day morning her mother and uncle (Tau) came to the Police Station and they took her to her House. After that Shakuntala came to her house and she was asked to go with Harshu. Harshu also informed her mother that he had taken a room in Shaharanpur. After that her month had gone to her parental house. Thereafter, in the month of *Falgun* in English calendar the month of February she went with Harshu. In the morning at 4.00 A.M. Harshu took her to Srinagar in a truck from her house and from

there she and Harshu went to Haridwar by bus and from Haridwar they reached Dhampur Railway Station and in Dhampur Railway Station the appellant Babu Ram met her and both of them had conversation. After that Harshu took her to Noorpur and from there she went to Mahmudpur. There Babu Ram told Rishipal that the victim Shakuntala is his daughter and in Mahmudpur she was married with Rishipal. She has further stated that Babu Ram sold her for Rs. 6,000/- and she married with Rishipal with her own will after considering all the facts. On the date of marriage Harshu went from the place in the night and Babu Ram went in the next morning. After 3 to 4 months of her marriage, she wrote a letter to her mother that letter is Ex.Ka-1. After that, the appellants came in her house and she was taken to Bijnor and from Bijnor she was taken to Tehri Garhwal and at Tehri Garhwal in the Court of Sub Divisional Magistrate her statement was recorded. In the cross-examination she has stated that rape was committed by Harshu in the forest and she had not told this fact to her mother or to any body else. She has further stated that she and Harshu both used to go in the forest. After the incident of rape, Harshu was used to rape with her continuously about three months and about that she had not told her mother. She has further stated that at the time of rape she had not received any injury. She has further stated that when she came to know about her pregnancy then this fact was informed to Harshu and she had not informed the same fact to her mother. She has further stated that along with Harshu she stayed in Pundir Hotel in the night at Srinagar. She ahs further stated that the report lodged by the brother of her sister-in- law (Bhabi) at Police Station Srinagar and police took

her along with Harshu to the police station and in the night they were detained in that police station. Next morning, her mother and uncle (Tau) came to the Police Station and thereafter she was taken Kirtinagar Police Station. She has further stated, "S.D.M. साहब को बयान दिया था कि चन्द्र सिंह गुसांई के कार्यालय में मेरी शादी हर्षू से मेरी मॉ व ताऊ के सामने हुई थी और इसकी लिखा पढ़ी हुई थी।'' She has further stated that she had given statement before the S.D.M. that in the office of Chandra Singh Gusai she was married with appellant Harshu in the presence of her mother and uncle (Tau) and some papers were also written and prepared for the same purpose. She has further stated that in Kirtinagar Police Station her statement was recorded by the police at the time of her marriage and that incident was taken place about two years back. She has further stated that she had given the statement before the S.D.M. that she had married to Rishipal as per Hindu rites and customs according to her own will and she is happily living with Rishipal.

> ''मैंने S.D.M. साहब के यहॉ बयान दिया था कि अपनी स्वेच्छा से हिन्दू रीति रिवाज के साथ ऋषिपाल से शादी की । ऋषिपाल के साथ में खुश हूॅ।
>
> मेरे मॉ बाप ऋषिपाल के घर महमूदपुर नहीं आये। मैंने ऋषिपाल को देखा और हम दोनों ने एक दूसरे को पसंद किया।''

10. She has further stated that she and Rishipal had accepted to each other with their own consent. She has further stated that she does not remember whether she had given this statement in the Court of S.D.M. that her mother has sent her along with Harshu with her own consent. मुझे ध्यान नहीं है कि S.D.M. साहब के यहॉ यह बयान दिया था कि मेरी मॉ ने स्वेच्छा से हर्षू के साथ भेज दिया। She has further stated that she had child of about 8-9 months old.

11. P.W.2 Smt. Sundari Devi has stated in her statement that appellant Harshu and Babu Ram are known to her and Shakuntala is her daughter. She has further stated that after 3 to 4 months when Shakuntala used to go for grazing the goats had told her that she was pregnant and she having an infant in her womb of Harshu. She has further stated that Harshu took Shakuntala to Parui for abortion but in Pauri the nurses refused to do so and in the evening Shakauntala came back to her house. Thereafter on 16th she went to her parental house and came back to her house after three days. At that time Shakuntala was not at home and Harshu also was not at home then she searched Shakuntala and after that she received a letter from Shakuntala. In the letter she has written that she was taken from her house by Harshu and Babu Ram. Along with the letter she went to her brother Mukandi Lal and the report was written by Mukandi Lal and she has put her thumb impression on the report, thereafter report was lodged in police Station Kirti Nagar that report is Ex.Ka-2. In cross-examination she has stated, ''मेरे पूछने पर शकुन्तला ने कहा कि पॉच महीने का गर्भ। यह बात कार्तिक महीने की है। तारीख 17&18 थी जिसे साल भर हो गया। इस कार्तिक में होंगे।'' She has stated that Shakuntala has told her that she has pregnancy of about five months and this was informed in the month of Kartik i.e. about 17-18th day relating to the month of October in English calendar. She has further stated that she has received a letter of her daughter after five months and on receiving the letter she has lodged the FIR and during the period of this five months she has not given information anywhere.

'' लड़की की चिटठी आने पर थाने में रिपोर्ट की है। लड़की के जाने पॉच महीने बाद रिपोर्ट की। इस पॉच महीने में मैंने कहीं और सूचना नहीं दी।''

12. She has further stated that brother of sister-in-law of Shakuntala has lodged FIR at Police Station Srinagar and when the police brought Shakuntala and Harshu in Krti Nagar Police Station at that time Kidu Pradhan along with her was present in the police station.

''शकुन्तला के भाभी के भाई ने हर्षू के खिलाफ श्रीनगर में रिपोर्ट की थी। शकुन्तला को भगाने की। जब शकुन्तला व हर्षू को पुलिस थाना कीर्तिनगर लाई तो उस समय मैं व किडु प्रधान थाने पर थे।''

13. P.W.3 Rishipal has stated in his statement that appellant Babu Ram and Harshu were known to him. Babu Ram used to visit his village and he had requested Babu Ram for his marriage then Babu Ram told him that he had a daughter named Shakuntala. Babu Ram demanded Rs. 6,000/- for his marriage with Shakuntala. Babu Ram reached his house along with Shakuntala and Harshu. Babu Ram told him that Shakuntala is his daughter and Harshu is his son. Babu Ram had received the money prior to the marriage and he had given Rs. 6,000/- to Babu Ram and Harshu. Harshu went from there at the same day and Babu Ram went in the next day after the marriage of Shakuntala. Before the marriage Babu Ram has told him that Shakuntala is pregnant. In cross-examination he has stated that he does not know whether Shakuntala has filed any case against uncle (Tau) in the court concerned at Bijnor.

14. P.W.4 Mukandi Lal has stated in his statement that Shakuntala is the daughter of his sister. He has further stated that Sundari Devi came to him

along with a letter of Shakuntala and at the dictation of Sundari Devi he has written the FIR i.e. Ex.Ka-2 and later on, it was submitted in the Police Station.

15. P.W.5-S.I. Hari Singh Tomar is the Investigating Officer has stated that on 27.09.1986 he was posted as Sub Inspector at Kirti Nagar Police Station. On that day, on the written report of Sundari Devi a *Chik* FIR was prepared by Head Moharrir Sher Singh Bora i.e. Ex.Ka-3 and the entry was made in the G.D., the copy of the G.D. is Ex.Ka-4. The investigation of the above said case was entrusted to him. During the course of investigation he has recorded the statements of the witnesses and the letter, which was given to him, is Ex.Ka-1 and for that he has prepared a Fard i.e. Ex.Ka-5. He has gone to Bijnor for the recovery of Shakuntala and on 01.10.1986 from the house of Rishipal Village Mahmudpur, Police Station Nahtor, District Bijnor at 8.30 A.M. Shakuntala was recovered and the recovery memo was prepared i.e. Ex.Ka-6 and map of the place of recovery was also prepared i.e. Ex.Ka-7 and the entry was made in the G.D., the copy of the G.D. is Ex.Ka-8. Thereafter he was transferred from that police station.

16. P.W. 6 is S.I. Karan Singh, S.O., Kirti Nagar Police Station, who has stated that on 11.11.1986 he was posted at Police Station Kirti Nagar and on that day the investigation of the above said case was entrusted to him. He has recorded the statement of the accused Harshu in the jail and after completing the investigation he has submitted the charge sheet i.e. Ex.Ka-9.

17. P.W.7 is Dr. Z.N. Khan, who has stated that on 02.10.1986 she was posted in the Women Hospital, Bijnor and on that day Shakuntala was brought to her by Constable Nareman Lal and at 1.00 PM Smt Shakuntala was medically examined by her. She has found no injury in any part of the body including the private parts of the body. In the internal examination she found the hymen ruptured, no bleeding and no redness were there. Two fingers were easily passed in the Vagina. Vaginal Smear was sent for pathological examination. As per pathologist report no spermatozoa was found in the vaginal smear. As per her opinion, no definite opinion can be given about the rape because she was habitual to intercourse. The original medical report and supplementary medical report were prepared i.e. Ex.Ka-10 and Ex.Ka-11 respectively. About the determination of the age, Smt. Shakuntala was referred to Chief Medical Officer who has submitted a report that report is Ex.Ka-12. As per that report, the age of Shakuntala is about 19 years but Shakuntala has told her age 20 years at that time.

18. After that the statement of appellant Babu Ram was recorded under Section 313 Cr.P.C., who denied the allegation made against him. In reply of question no. 12 he has stated that he has been falsely implicated due to the enmity of village election and statement of appellant Harshu was also recorded under Section 313 Cr.P.C who also denied the allegation made against him and in reply to question no. 12 he has stated that he married with Shakuntala.

19. Ms. Pushpa Joshi, learned counsel for appellant no. 1-Babu Ram and Sri R.S. Bisht, learned

Amicus Curiae for appellant no.2-Harshu have submitted that no case under Section 376 and 366 IPC is made out against the appellants. For the argument, they have submitted that the FIR in the above said case is delayed about one year. They have further submitted that as per prosecution case, the rape was said to be committed with victim Shakuntala from the month of September 1985 to December 1985 and the FIR of the said case was registered on 27.09.1986 at Police Station Kirti Nagar at 3.30 P.M. They have further submitted that when this fact was come to the knowledge of the mother of the victim that she was pregnant for about five months then she sent Shakuntala with Harsh to Parui for abortion but the nurses refused to do so as the pregnancy was at the advanced stage of five months. After that the victim went to Srinagar along with Harshu with the consent of her mother and there she stayed in a hotel named Pundir Hotel and the FIR was lodged by the brother of sister-in -law (Bhabhi) of the victim for which victim Shakuntala and Harshu were remained the whole night at Police Station Srinagar and next day morning, on coming of mother of the victim and her uncle (Tau) they could have been released from the police station and they were taken to Police Station Kirti Nagar where the Investigating Officer recorded the statement of victim Shakuntala and also her mother. After that in the month of March 17/18, 1986 Harshu took Shakuntala with the help of Babu Ram from his village to Srinagar at 4.00 A.M. in a truck and from there she and Harshu went to Haridwar by bus and from Haridwar they reached Dhampur Railway Station. After that Harshu took her to Noorpur and from there they went to Mahmudpur, where Babu Ram has told Rishipal that the victim Shakuntala is his

daughter. In Mahamudpur she was married with Rishipal with her own consent and after about six months of the marriage her mother lodged the FIR at Police Station Kirti Nagar. Accordingly, they have submitted that delay in lodging the FIR is not explained by the prosecution and that is fatal for the prosecution case.

20. From the perusal of the evidence, it is clear that the said incident was taken place between Spetember to December 1985 and Shakuntala visited Pauri and Srinagar with the consent of her mother and the pregnancy was also in the knowledge of her mother and in the month of March 1986 she went to Srinagar, Haridwar, Dhampur, Noorpur and Mahmudpur where she married with Rishipal. Shakuntala has also stated that she had gone to the office of Chandra Singh Gusai, Kirti Nagar where she married with Harshu in the presence of her mother and uncle (Tau) and some papers were also written for this purpose. This conduct of the mother of the victim Shakuntala shown that the entire fact was in her knowledge from the very first day of the incident as said to be happened and delay in lodging the FIR has not been explained in the FIR and also in the evidence produced by the prosecution. Even in the statement recorded in the Court of S.D.M., a single word has also not been stated about the delay in lodging the FIR or to explain the circumstances as to why she has not lodged the FIR in the police station concerned for one year and who prevented her from lodging the FIR. In support of their submission, learned counsel for the appellants have cited a judgment rendered by the Hon'ble Supreme Court in the case of *State of Karnataka v.*

Mapilla P.P. Soopi reported in (2003) 8 SCC 202. They have relied on para-4 which is as follows:-

> "Undue delay in lodging the complaint Without acceptable evidence has also Contributed to the doubt in the prosecution case. Hence, the High Court was justified in allowing the appeal."

21. Thus from the evidence discussed above and the judgment (supra) cited above, it is clear that the delay in lodging the FIR has not been explained by the prosecution and it creates doubt in the prosecution story. Under these circumstances, for the fact that the delay in lodging the FIR for one year which has not been explained by the prosecution, the benefit of doubt will go to the accused.

22. Next argument advanced by the learned counsel for the appellants is that victim Shakuntala had gone with Harhshu with the own consent and she was major at the time of incident.

23. It is not disputed fact that victim Shakuntala was major at the time of incident as she has herself stated in her statement recorded on 16.09.1987 that her age is about 20-21 years and at the time of medical examination she has also stated her age 20 years. The Chief Medical Officer, Bijnor has also determined her age 19 years.

24. Learned counsel for the appellants have further submitted that the marriage of Rishipal and Shakuntala was solemnized with their own consent

Without any pressure and they are living happily with their children. They have further submitted that Rishipal and Shakuntala are not aggrieved in any manner with their marriage and Shakuntala was not compelled to marry with Rishipal, as per the statement of Shakuntala. Relevant potion of her statement is reproduced as under:-

> ''मैने S.D.M. साहब के यहॉ बयान दिया था कि अपनी स्वेच्छा से हिन्दू रीति रिवाज के साथ ऋषिपाल से शादी की। ऋषिपाल के साथ में खुश हूॅ।
>
> मेरे मॉ बाप ऋषिपाल के घर महमूद नहीं आये। मैंने ऋषिपाल को देखा और हम दोनों ने एक दूसरे को पसंद किया।''

25. Hence, it is clear that victim Shakuntala married with Rishipal with her own consent without any pressure and the appellants had not forced her to marry with Rishipal. From the circumstances narrated above, it is also clear that victim Shakuntla was not kidnapped by the appellants, on the contrary she had gone to Mahmudpur with her own consent without any pressure to marry with Rishipal and now she is living with Rishipal along with her children happily.

26. As per the evidence, the victim was major more than 18 years at the time of incident, which was happened from the month of September 1985 to December 1985. As it shows from the conduct of the victim that in the forest both victim Shakuntala and Harshu used to go for gazing the goats and she was raped by Harshu up to three months continuously but she had not to this fact to her mother or to any body else and when this fact was come to the knowledge of her mother then her mother told Harshu for abortion and he

took the victim to Pauri for abortion but the nurses refused to do so as the pregnancy was at the advance stage and abortion was not possible. Thereafter, she was sent by her mother to Srinagar where they stayed in Pundir Hotel in the night. Later on, a compliant was made by the brother of sister-in-law (Bhabhi) of victim Shakuntala, as a result of which the police have taken Harshu and Shakuntala in the police station and in the next day morning they could have been released from the police station Srinagar on the request of mother of Shakuntala and uncle (Tau) of Shakuntala and they were taken to Kirti Nagar Police Station where the statement of victim and her mother were recorded and thereafter the victim was sent along with her mother to her house. After that the victim went to Srinagar with Harshu in the morning at 4.00 AM in a truck and from there she and Harshu went to Haridwar by bus and from Haridwar they reached Dhampur Railway Station. After that Harshu took her to Noorpur and from there they went to Mahmudpur where she married with Rishipal, P.W.3 of this case, with her own 'will' without any pressure. It shows the conduct of the victim who was consented party and major.

27. After considering the circumstances that they were enjoying from the last one year and after that when she became pregnant she married with another person and now she is living with her children happily and from the conduct that she traveled first in a truck then by bus then by tempo and she visited number of cities and villages but she did not cry and did not make complaint to any body. This conduct of the victim shows that she was a consented party and she was major as admitted by

the prosecution also on the date of incident. In support of his argument learned counsel for the appellants have cited a judgment rendered by the Hon'ble Supreme Court in the case of *Narayan alias Naran vs. State of Rajasthan* reported in (2007) 3 SCC (Cri) 198 in which they have relied on paras 11, 12, 13, & 15 which are as follows:-

> "11. In the cross-examination the prosecutrix (PW 3) stated that she boarded the trolley at about 5 o'clock in the evening and by 7 o'clock they reached Singpur Village. There were number of villages between Singhpur and Akodiya. It is also required to appreciate that she stated in her evidence that even after the accused committed rape on her she sat in the tractor happily. It is not stated by her in her evidence that she raised any hue and cry even while passing through the number of villages. In the first information report (Ext.P-5) she stated that the accused committed rape on her thrice but in the evidence she stated that the accused committed rape on her only twice and not thrice. According to her the rape was committed on her on kankar (rough way). She did not state that she offered any resistance though she was physically very strong. Medial report (Ext.P-1) says that there were no injuries on the body of the prosecutrix (PW3) There were no injuries on her private part. It is ultimately opined that "no definite opinion can be given regarding rape, however, she is habitual to sexual intercourse". In the circumstances, is it possible to believe that the prosecutrix (PW3) has been subjected to rape twice by the accused as alleged? In the first information report (Ext.P-5) it is stated that the prosecutrix (PW3) has been subjected to rape by the accused thrice but in her evidence she stated that she had been subjected to rape only twice. The accused even according to the prosecutrix (PW3) was driving the tractor from Singhpur to Bharkiya crossing

through a number of villages. It is not stated by the prosecutrix (PW3) that she made any attempt to get down from the tractor at any point of time. On the other hand, it is stated by her that she sat in the tractor happily.

12. Yet another important aspect of the matter, in the first information report and as well as in her evidence the prosecutrix (PW3) stated that she revealed the entire episode of committing rape on her by the accused to Smt Tejkanwar (PW 6) in whose house in Akodiya Village she slept on the fateful night. She also state about the accused's snatching of Rs. 1000 from her and also some jewellery. Smt Tejkanwar (PW6) in her evidence did not state that the prosecutrix (PW3) narrated the incident of rape committed on her by the accused to her. The evidence of the prosecutrix (PW3) if full of material contradictions. There is no corroboration whatsoever from any of the witnesses, more particularly in the evidence of Smt Tejkanwar (PW6) who is a material witness. It is true, the evidence of the prosecutrix (PW3) itself, if acceptable, is sufficient to establish the charge against the accused but her evidence is so artificial with cannot be accepted.

13. In the circumstances, we are of the considered opinion that the prosecution miserably failed to establish the charge against the appellant for the offence punishable under Section 376 IPC.

14. For all the aforesaid reasons, we hold that the prosecution failed to establish the charges framed against the appellant for the offences punishable under Sections 376 and 392 IPC. The conviction as well as sentences imposed upon the appellant for the offences punishable under Section 376 and 392 IPC are accordingly set aside."

28. In the above said circumstances and the judgment and dictum made above, it is made clear that victim Shakuntala was major at the time of incident and was a consented party, hence no offence under Sections 376 and 366 IPC is made out against the appellants on the basis of above said facts and circumstances.

29. After considering all the facts and circumstances of the case as narrated above, the judgment of the court below is not justified and correct, as per the law and the evidence available on record.

30. Accordingly, the appeal is allowed. Judgment and order dated 21.01.1988 passed by Sessions Judge, Tehri Garhwal in Sessions Trial No. 10 of 1987 as well as the conviction and sentence made against the appellants in the above said Sections is hereby set aside.

(Dharam Veer, J.)

22.09.2007
RBS